APPEAL NO. 040278
FILED APRIL 2, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on January 8, 2004. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on November 18, 1999. The claimant appealed the hearing officer's determination based on sufficiency of the evidence. The claimant attached a medical document that was not offered at the CCH. The appeal file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

The claimant attached a medical document dated August 21, 2003, to support her contention that she was not at MMI on November 18, 1999. The claimant contends that she inadvertently omitted this document at the CCH. The Appeals Panel has held that it will generally not consider evidence that was not submitted into the record at the hearing and is raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The evidence that the claimant attached to her appeal could have been secured with due diligence prior to the CCH; consequently, we will not consider that document for the first time on appeal.

The claimant testified that she slipped and fell on a wet floor on _____. It is undisputed that the claimant sustained a compensable left elbow injury on _____, and that her compensable injury extends to and includes her neck and lower back. On May 18, 2000, the Texas Workers' Compensation Commission (Commission)-appointed designated doctor, Dr. M, examined the claimant and certified that the claimant reached MMI on November 18, 1999, with a 0% impairment rating (IR). On October 23, 2000, Dr. M responded to a request for clarification from the Commission and opined that the claimant's IR remained at 0%. On November 20, 2001, Dr. M responded to a request for clarification from the Commission to review additional medical documentation, and he opined that the claimant's MMI and IR remained the same. On May 8, 2002, the claimant had spinal surgery at L4-5 and L5-S1. On March 14, 2003, Dr. M responded to a request for clarification from the Commission to consider the claimant's spinal surgery of May 8, 2002, and he opined that he was unable to assign an IR since the claimant was still recovering from spinal

surgery. On June 23, 2002, Dr. M determined that the claimant's IR was 13% and that the date of MMI remained November 18, 1999. At the CCH, the parties stipulated that the claimant's IR was 13%, and that the date of statutory MMI was August 29, 2001.

The claimant essentially complains that because she continued to have back problems after November 18, 1999, and that she eventually had spinal surgery on May 8, 2002, that it was medically impossible for her to be at MMI on November 18, 1999. The claimant contends that she reached MMI on April 22, 2003. A functional capacity evaluation dated April 22, 2003, reflects that her treating doctor, Dr. F, took into consideration her spinal surgery and Dr. F opined that the claimant was able to return to work at a sedentary level without restrictions. The claimant argues on appeal the date of MMI was prematurely determined; that the medical evidence shows by a preponderance of the evidence that she was not at MMI on November 18, 1999; that the opinions of other medical doctors prior to the date of her spinal surgery on May 8, 2002, be disregarded; that it is unfair to her; and that the hearing officer's judgment was favorable to the carrier.

Section 401.011(30)(A) defines MMI to mean the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated. Sections 408.122(c) provides that for a claim for workers' compensation benefits based on a compensable injury that occurs before June 17, 2001, the report of the designated doctor has presumptive weight, and the Commission shall base its determination of whether the employee has reached MMI on that report unless the great weight of the other medical evidence is to the contrary. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight.

The hearing officer determined that the great weight of other medical evidence "is not sufficient to contradict the finding of November 18, 1999 as the date of [MMI]" as determined by the designated doctor, Dr. M, on May 18, 2000, and maintained by Dr. M in subsequent correspondence. A letter from Dr. M dated May 18, 2000, reflects that he diagnosed the claimant with a resolved fracture of the left elbow, resolved cervical spine sprain, and resolved lumbar spine sprain. A letter from Dr. M dated November 20, 2001, reflects the claimant did not seek medical treatment after November 18, 1999, at which time she was found to be at MMI. Dr. M opined that the claimant was asymptomatic and had reached "[MMI] by definition." A letter from Dr. M dated June 23, 2002, reflects that he took into consideration the claimant's spinal surgery of May 8, 2002, and that Dr. M changed the claimant's IR from 0% to 13%, however he opined that the claimant's date of MMI remained the same as November 18, 1999. Additionally, a medical report dated November 18, 1999, from the claimant's first treating doctor, Dr. G, reflects that he certified the claimant reached MMI on November 18, 1999, with an 8% IR. Dr. G opined that the claimant had a full range of motion to her left elbow, cervical spine, and lumbar spine. The hearing officer did not err in giving presumptive weight to the designated doctor's report in accordance with Section 408.122(c) and Rule 130.6(i). The hearing officer's determination on MMI is supported

by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

With regard to the claimant's other contentions that the hearing officer's decision was unfavorable and unfair to her, we find no merit to her contentions. The fact that the hearing officer's decision is unfavorable to the claimant's claim does not mean that it was unfair to her. We perceive no error.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERICAN PROTECTION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge